

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DOMINICK ALVARADO, JR.,

Defendant and Appellant.

C081154

(Super. Ct. No. 62130889)

A jury convicted defendant Jose Alvarado, Jr., of resisting an executive officer in performance of his duties and battery on emergency personnel. The trial court sentenced him to four years four months in prison and awarded presentence credit.

Defendant now contends the trial court failed to (1) properly calculate his presentence credit, and (2) instruct the jury on unconsciousness as a defense.

We will affirm defendant's convictions but remand the matter to the trial court to determine whether defendant is entitled to additional presentence credit.

BACKGROUND

In March 2014, officers responded to a disturbance call in a subdivision in Placer County. The caller reported that a man had been outside yelling for the past three days.

Defendant yelled various things such as, “You come near me, and I’ll kick your ass” and “If you touch me, it will be the worst thing you ever did.” The officers believed defendant may have been under the influence of a narcotic or stimulant. Defendant swung his arms, tried to kick an officer, and adopted a fighting stance with his fists raised. An officer performed a leg sweep and defendant punched and kicked the officers. An officer used a taser on defendant but defendant continued to struggle. The officers eventually handcuffed defendant. When emergency medical personnel placed defendant on a gurney, defendant spit in a paramedic’s face.

In April 2014, defendant was arrested on an unrelated charge in Sacramento County for reckless evasion of a peace officer. (Veh. Code, § 2800.2, subd. (a).) He was held in the Sacramento County jail pending trial on that charge.

Meanwhile, defendant was ordered to appear for arraignment in Placer County, but because he was in custody in Sacramento, Placer County placed a “hold” on him (i.e., a warrant for his arrest was placed in abeyance). After spending some time in Napa State Hospital, defendant was convicted in Sacramento County and sentenced to 16 months in prison on April 2, 2015. Because his presentence credit exceeded his 16-month sentence, the Sacramento County trial court deemed his time served.

Defendant was transferred to the Placer County jail. A jury subsequently convicted him of resisting an executive officer in performance of his duties (Pen. Code, § 69¹ -- counts one through three) and battery on emergency personnel (§ 243, subd. (b) - count four). On January 13, 2016, the trial court sentenced defendant to four years four months in prison and initially awarded him 569 days of presentence credit (285 actual and 284 conduct).

¹ Undesignated statutory references are to the Penal Code.

In July 2017, appellate defense counsel filed a motion for correction of presentence custody credit in the Placer County trial court, claiming defendant was entitled to additional credit for time spent in the Sacramento County jail while subject to the Placer County hold. The trial court agreed, but only in part, and awarded defendant 572 days of presentence credit (286 actual and 286 conduct).

DISCUSSION

I

Defendant contends the trial court failed to properly calculate his presentence credit. He claims that once his Sacramento County sentence was deemed served, any excess time he spent in custody that was not needed to satisfy his Sacramento County sentence became solely attributable to his Placer County case because Placer County had placed a hold on him.

A defendant convicted of a felony is entitled to presentence credit against the term of imprisonment for the actual time spent in local custody prior to sentencing. (§ 2900.5.) A defendant may also earn conduct credit for good behavior during the time in local custody. (§ 4019.) Section 2900.5 specifies that presentence credit is applied first to the term of imprisonment imposed and thereafter to any base fines imposed. (§ 2900.5, subd. (a).) “If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served.” (§ 2900.5, subd. (a).)

Presentence credit is given only where the custody is attributable to the same conduct for which the defendant was convicted. (§ 2900.5, subd. (b); Stats. 2013, ch. 59, § 7, eff. Jan. 1, 2014; Stats. 2014, ch. 612, § 5, eff. Jan. 1, 2015 [same]; Stats. 2015, ch. 209, § 2, eff. Jan. 1, 2016 [same].) As the California Supreme Court explained, presentence custody stemming from unrelated incidents may not be credited against a subsequent incarceration if the conduct was not a cause of the earlier restraint. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183.) Nevertheless, custody after placement of another county’s hold is attributable to both county cases, and credit from a dismissed case

should be applied to the remaining case. (*In re Marquez* (2003) 30 Cal.4th 14 (*Marquez*).)

The Placer County trial court awarded defendant credit for the 286 days between his April 2, 2015 sentencing in the Sacramento County case and his January 13, 2016 sentencing in the Placer County case. But Placer County placed a hold on defendant on August 12, 2014, which was 233 days prior to the Sacramento County sentencing. From the date of the Placer County hold until the earlier of the Sacramento County sentencing hearing or the date defendant satisfied his Sacramento County sentence, defendant's custody was attributable to both the Sacramento County and Placer County cases. (*Marquez, supra*, 30 Cal.4th at p. 20.) The trial court previously ruled that *Marquez* does not require an award of additional presentence credit, but the trial court did not explain its reasoning or its findings.

Depending on when defendant satisfied his Sacramento County sentence, we conclude it may be appropriate to apply excess presentence credit to the Placer County sentence. But we cannot definitively determine whether defendant is entitled to additional presentence credit, because we do not know when defendant's Sacramento County sentence was deemed satisfied, and we do not know if excess credit was applied to fines. Under the circumstances, we will remand the matter to the trial court to make such determinations.

II

Defendant next contends the trial court failed to instruct the jury on unconsciousness as a defense.

Unconsciousness, when not voluntarily induced, is a complete defense to a charged crime. (*People v. Rogers* (2006) 39 Cal.4th 826, 887; *People v. Babbitt* (1988) 45 Cal.3d 660, 693; § 26.) A person may be deemed unconscious if he or she committed an act without being conscious of it. (*Rogers*, at p. 887.) A trial court has a sua sponte duty to instruct on unconsciousness "if it appears the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not

inconsistent with the defendant's theory of the case." (*Ibid.*; see generally, *People v. Breverman* (1998) 19 Cal.4th 142, 157.) The evidence must be sufficient to deserve consideration by the jury. (*People v. Williams* (1992) 4 Cal.4th 354, 361.)

Defendant concedes he did not rely on the defense of unconsciousness and his counsel did not articulate a theory of unconsciousness. But he argues the trial court should have instructed on it because it was supported by the evidence. We disagree.

Defendant points to law enforcement testimony that they could not understand what defendant was saying during the incident. He also cites his own testimony regarding his history of mental illness, that he had no memory of the paramedic, and that he had been "mind broadcasting." But "mere evidence of mental disease or defect, without more, does not raise the defense of unconsciousness and does not entitle the defendant to instructions on that issue." (*People v. Froom* (1980) 108 Cal.App.3d 820, 830.)

Here, the evidence indicates defendant was aware of the events as they occurred. Defendant testified he had taken his medication the night before and had a good night's rest. He said his medication helped control his bipolar disorder. Defendant testified to his path of travel, when he saw the police officers, and that he crossed the street using the crosswalk. He responded to the officers, albeit with threats, and told them he would not stop resisting when instructed to do so by one of the officers. Defendant remembered the officers and that one of them had "tased" and tackled him to the ground. He said he resisted so that an officer would not break his arm when trying to handcuff him. He knew how long he had been on the ground. The detail of his testimony shows he was conscious of his surroundings, his actions, and the actions of the officers. His claim that he did not remember the paramedic is not enough to require a sua sponte instruction on unconsciousness. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417-418; *Froom, supra*, 108 Cal.App.3d at pp. 829-830.)

This case is different from *People v. James* (2015) 238 Cal.App.4th 794, 809-810, in which the court concluded sufficient evidence warranted an unconsciousness instruction. The defendant in *James*, who had a previous head injury resulting in a seizure disorder, attempted to climb the exterior of a building, hit his head on cars and garbage cans, took off his clothes, and bit a stranger in the face. (*Id.* at pp. 800-801.) A clinical psychologist testified as an expert that the defendant experienced an episode of psychosis in which he lost touch with reality. (*Id.* at pp. 798, 801.) No similar evidence was presented in this case.

Given the totality of the evidence presented at trial, the trial court did not have a sua sponte duty to instruct the jury on the defense of unconsciousness.

DISPOSITION

Defendant's convictions are affirmed. The matter is remanded to the trial court to determine whether defendant is entitled to additional presentence credit. If the trial court determines additional presentence credit should be awarded, it shall prepare an amended abstract of judgment and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

/S/
MAURO, J.

We concur:

/S/
BUTZ, Acting P. J.

/S/
RENNER, J.